



The Commonwealth of Massachusetts  
 Executive Office of Health & Human Services  
 Department of Developmental Services  
 500 Harrison Avenue  
 Boston, MA 02118-2439

Deval L. Patrick  
 Governor

Timothy P. Murray  
 Lieutenant Governor

JudyAnn Bigby, M.D.  
 Secretary

Elin M. Howe  
 Commissioner

Area Code (617) 727-5608  
 TTY: (617) 624-7590

2010

MA

Re: Appeal of - Final Decision

Dear :

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your daughter's eligibility determination.

The hearing officer made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DDS regulations. Your daughter's appeal is therefore DENIED.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with Massachusetts General Laws, Chapter 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,

Elin M. Howe  
 Commissioner

EMH/ecw

cc: Marcia Hudings, Hearing Officer  
 Amanda Chalmers, Regional Director  
 Marianne Meacham, General Counsel  
 Barbara Green Whitbeck, Assistant General Counsel  
 Paula Potvin, Regional Eligibility Manager  
 Patricia Shook, Psychologist  
 File



COMMONWEALTH OF MASSACHUSETTS<sup>1</sup>  
DEPARTMENT OF DEVELOPMENTAL SERVICES

**In Re: Appeal of [REDACTED]**

AMENDED DECISION

This Amended Decision is issued in accordance with the Commissioner's determination to remand my Recommended Decision dated April 19, 2010. I have given further consideration to this appeal as requested. I agree that I did not base my decision on the facts presented at the hearing, but rather looked to information beyond the purview of the hearing in rendering my Recommended Decision.

I have reviewed the evidence submitted, revised my findings of fact in accordance with the evidence and have made my decision consistent with the Department's regulations governing child eligibility for Family Support services.

This Amended Decision is issued pursuant to the regulations of the Department of Developmental Services (DDS) (115 CMR 6.30 - 6.34) and M.G.L. Chapter 30A.

A hearing was held on March 26, 2009 at DDS's Hogan Regional Center in Hathorne, Massachusetts

Those present for the proceedings were:

[REDACTED] Psy.D.	Appellant's mother
Patricia Shook, Ph.D.	Psychologist
Paula Potvin	DDS Psychologist
Barbara Green Whitbeck	DDS Regional Eligibility Manager
	Attorney for DDS

The evidence consists of documents jointly submitted by the Appellant and DDS numbered 1-17 and approximately 1 and 1/2 hours of oral testimony. In the course of making my decision, I also reviewed the Autism Waiver Program Overview which I obtained from the Department's website. Information relative to the Autism Waiver Program was not presented at the hearing nor was any testimony offered by either party relative to the Program's requirements. Because there was no information relative to the Program's requirements in evidence, I did not take the Autism Waiver Program into consideration when rendering this Amended Decision.

<sup>1</sup> The name of the Department of Mental Retardation (DMR) changed to the Massachusetts Department of Developmental Services (DDS) on June 30, 2009.

## ISSUE PRESENTED

Whether the Appellant meets the child eligibility criteria for DDS Family Supports as set out in 115 CMR 6.06.

## SUMMARY OF THE EVIDENCE PRESENTED<sup>2</sup>

1. The Appellant is a 7 year old female who resides with her family in [REDACTED] Massachusetts. (4, 6-7, testimony of Appellant's mother)
2. This Appeal is based on the Appellant's denial of eligibility for DDS Family Support Services based on the determination that she did not meet DDS criteria for developmental disabilities. (4)
3. A letter dated March 6, 2009 signed by Veronica Wolf, Regional Eligibility Manager stated that the Appellant met the Autism Spectrum Division's eligibility criteria.(4)
4. Six evaluations of the Appellant's intellectual functioning and behaviors were entered into evidence. (7-11,13)
5. Two Vineland-II Adaptive Scales (Vineland-II) Survey Interview Form Reports were entered into evidence. (14-15)
6. Three letters of support for DDS eligibility were entered into evidence. (12,16-17)
7. In November of 2007 when the Appellant was 5 years [REDACTED] of age, she was evaluated by a team of doctors from [REDACTED]. The team was up made of [REDACTED] MD., Fellow in Developmental Medicine, [REDACTED] MD, M.P.H., Attending Developmental Behavioral Pediatrician and [REDACTED] Ph.D., Staff Psychiatrist. The Section of the report labeled Pediatric Assessment/Behavioral Observations stated that the Appellant's language was very difficult to understand at times due to articulation problems and that she required some repetition of directions and comments. The section labeled Neurodevelopmental Assessment noted that the Appellant's speech intelligibility was clearly impaired and that she required repetition of directions for several tasks.

The report stated that the Appellant's functional adaptive skills were evaluated using the Vineland-II which was administered by [REDACTED] MD to the Appellant's mother. The result of this evaluation was that the Appellant's adaptive behavior composite score was well within the moderately low range. Her functional daily living skills fell within the moderately low range; her functional

<sup>2</sup> There were no changes made from the Recommended Decision relative to the Evidence Presented.

communication skills fell in the adequate range; her functional socialization skills fell within the moderately low range and her functional motor skills fell within the adequate range. The Neurodevelopmental Assessment concluded that the Appellant had significant articulation and receptive communication problems and presented with difficulties in both language and motor skills.

The Appellant was given the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III). The report states that her overall cognitive abilities were nicely developing within the average range for her age. It also states that her verbal abilities and her performance abilities were not significantly different from each other. On Pre-Academic testing of Achievement Skills, the Appellant's overall early reading skills were average as compared to her peers. She also demonstrated average math skills for her age.

The team concluded that the Appellant's speech intelligibility was quite limited due to articulation problems, and she had difficulty following directions due to comprehension difficulties. They found that these difficulties are consistent with a diagnosis of Communication Disorder, Not Otherwise Specified. They also felt she demonstrated impairment of growth and fine motor skills consistent with a diagnosis of Developmental Coordination Disorder. The team noted that despite her limitations, the Appellant demonstrates a number of strengths including her solid cognitive ability. (7)

8. In May of 2008 when the Appellant was 5 years [REDACTED] of age, she was seen for a follow-up by the [REDACTED]. During this visit [REDACTED] MD, MPH was the attending physician. The report of this follow-up states that the Appellant's mother reported that the Appellant was demonstrating increased anxiety with a significant sensory component as well as frequent daydreaming. It also states that the Appellant's therapist, [REDACTED] MA, LMHC, Psy.D. raised concerns for Obsessive-Compulsive Disorder and Pervasive Developmental Disorder. The report notes that the Appellant was seen by [REDACTED] MS, CCC-SLP at [REDACTED] who agreed that the Appellant has significant language needs in both expressive and receptive language. The report states that the Appellant was assessed by [REDACTED], Ph.D. using the Autism Diagnostic Observation Schedule (ADOS). She found that the Appellant's presentation was not consistent with an autism spectrum disorder. The report states that the Appellant's presentation of elevated anxiety with the emergence of obsessive thoughts and compulsive behaviors met the criteria for both a Generalized Anxiety Disorder and Obsessive-Compulsive Disorder. It concluded that she continued to meet the criteria for Communication Disorder, but that her difficulties did not appear to be due to an autism spectrum disorder. Dr. [REDACTED] who assessed the Appellant in her previous evaluation concurred with this assessment after meeting with the Appellant and her mother. (8)
9. The Appellant returned to the Developmental Medicine Center in August of 2008 when she was 6 years [REDACTED] of age for a follow-up. Mention was made of the

mother's observation that the Appellant's articulation had improved but that she continued to have difficulty following two-step directions. The report points out that the Appellant underwent a fine motor assessment and that the assessment revealed that the Appellant performed at the 14<sup>th</sup> percentile which is borderline motor impairment. The report concluded that in the context of a Communication Disorder and an Anxiety Disorder, the Appellant continues to demonstrate fine motor needs necessitating continued occupational therapy. (9)

10. In October of 2008 when she was 6 years [REDACTED] of age the Appellant was seen for a neurological consultation at the [REDACTED] by [REDACTED], MD Dr. [REDACTED] who is the Director of Pediatric Epilepsy and EEG noted the Appellant's evaluations at the Developmental Medicine Center and set out the diagnoses given by the team. She also noted that the ADOS had been administered but did not present the results of the evaluation. After interviewing and observing the Appellant for over 2 hours Dr. [REDACTED] concluded the Appellant has a Pervasive Developmental Disorder Not Otherwise Specified. She explained that this is a diagnosis used for children who have many of the features of an autistic spectrum disorder, but do not meet the full criteria. Dr. [REDACTED] appears to base her diagnosis on the Appellant's communication problems and her difficulties in playing as well as her repetitive behaviors and likely compulsions. Dr. [REDACTED] did not believe that the Appellant's staring was due to seizures. She noted that she suspected that the Appellant's overall level of intelligence is within the normal range, but perhaps on the lower side. She pointed out that the Appellant has trouble comprehending and processing information, particularly if it is not broken down into simple components. (10)
11. In April of 2009 when the Appellant was 6 years [REDACTED] of age, she was again seen by Dr. [REDACTED]. The report states that the Appellant was doing better in school since being placed in an inclusion classroom. It states that the Appellant passed math but is struggling with reading comprehension. Dr. [REDACTED] states that the Appellant's obsessive-compulsive symptoms have been increasing. She also states that the Appellant's new teacher has observed her [REDACTED]. In this report, Dr. [REDACTED] again states that the Appellant has Pervasive Developmental Disorder Not Otherwise Specified accompanied by obsessive-compulsive symptoms and a sensory integration disorder. In her report, Dr. [REDACTED] states that the Appellant would benefit from services from the Department of Developmental Disabilities as well as from social skills training outside of school. (11)
12. In July of 2009 when the Appellant was 7 years of age, she was evaluated at the [REDACTED], [REDACTED], Ph.D. a Neuropsychologist; [REDACTED] MS, CCC-SIP, a Speech/Language Pathologist and [REDACTED], M.Ed., an Educational Specialist took part in the evaluation. They wrote a lengthy report and offered the following Diagnostic Impressions: The results of neuropsychological testing revealed the Appellant's level of intellectual ability at the upper end of the low average range. This was based on the administration of the Wechsler Intelligence

Test for Children – fourth edition (WISV-IV). Her Full Scale IQ score on that test was 89. They noted that the results of cognitive testing indicated a developmentally based language deficit with receptive, expressive and amnesic (word retrieval) features that have impacted the Appellant's academic achievement. On the Kaufman Test of Educational Achievement-II (KTEA-II) which was administered to the Appellant at the end of 1<sup>st</sup> grade, she attained the following grade equivalent scores: Letter and Word Recognition – 1.7, Nonsense Word Decoding – 1.6, Reading Comprehension – 2.0, Written Expression – 1.4, Math Concepts and Applications – K.5, Math Computation – 1.4. The team noted that the Appellant had made gains in speech intelligibility and continued to have mild/ moderate delays in receptive and expressive language areas. They also noted that she had limited oral language and social language and should have intensive services to support the needs of a language-learning disability (LLD). Educational testing revealed that the Appellant's language weaknesses interfere with her understanding of narrative interpretation of accompanying pictures, written expression and with math problem solving and conceptual understanding. The report also pointed out that the Appellant's computational skills are below average. (13)

13. The two Vineland-II Survey Interview Form Reports that were introduced showed different scores in the areas of Communication, Daily Living Skills, Socialization, and Motor Skills as well as the Adaptive Behavior Composite. The Appellant's mother scored the Appellant Low in all of the aforementioned areas while her [REDACTED] the Appellant's Special Education Teacher scored her Adequate in all areas with the exception of Motor Skills in which she scored the Appellant as Moderately Low. (14-15)
14. Three letters of support for DDS services were submitted. Two letters were written by the Appellant's therapist [REDACTED] MA, Psy.D. LMHC. One letter was written by [REDACTED] MD. Both state that the Appellant has among other diagnoses, one of Pervasive Developmental Disorder NOS (PDD-NOS) and would benefit from the services of DDS. Dr. [REDACTED] states that if such services are not provided the Appellant will be negatively impacted. Neither Dr. [REDACTED] nor Dr. [REDACTED] provided the results of any testing or examinations performed by them or other professionals in their letters. (12, 16-17)
15. [REDACTED] testified on behalf of the Appellant. She stated that she was the Appellant's mother and that her daughter was almost 8 years of age. She outlined some of the diagnoses that the Appellant has received including PDD NOS, General Anxiety Disorder, Coordination Disorder and Communication Disorder. She stated that her daughter was currently in an inclusion program and barely getting by. She stated that her daughter has few friends and does not really understand how to play. She believes that her daughter needs extensive therapy in many areas and that she qualifies for DDS services. Ms. [REDACTED] testified that she knows of other children who are on the autism spectrum that are receiving DDS supports. She verified that her daughter has met the DDS Autism Spectrum Division's eligibility criteria. Ms. [REDACTED] also stated that her husband has been out of work and that the Appellant

has not been getting the therapy that she needs due to the cost and the lack of insurance.

16. [REDACTED] MA, Psy.D. LMHC testified on behalf of the Appellant. Dr. [REDACTED] stated that although she has her doctorate in Clinical Psychology she is not a licensed psychologist in the Commonwealth of Massachusetts. I did not qualify Dr. [REDACTED] as an expert in the field of Developmental Disabilities. Dr. [REDACTED] testified that she is the Appellant's therapist and has been meeting with her weekly since 2008. She testified that the Appellant has significant social issues and a Communication Disorder. She stated that she has seen a change in the Appellant's behavior over time. She testified that although the Appellant's IQ seems to be fine - a Full Scale of 89, she doesn't retain information. She stated that someone who would come into the Appellant's home to help the family understand how to deal with the Appellant would be helpful. Dr. [REDACTED] testified that she believed that the Appellant had functional impairments in the areas of self- direction and communication.
  
17. Patricia Shook, Ph.D. testified as an expert witness on behalf of DDS. She stated that she is the DDS Eligibility Specialist for the Northeast Region and has been in that position for four and a half years. She stated that in this role she makes eligibility determinations based on information provided to her relative to an individual applying for DDS services. She stated that in making her determination in the instant case, she reviewed the Appellant's documentation and participated in an informal conference. She also stated that that she reviewed additional information provided to her by the Appellant including the Appellant's last neurological examination. She stated that in her opinion the Appellant is not eligible for DDS family supports. Dr. Shook recited the DDS regulations relative to eligibility for family supports. She stated that the individual must be under the age of 18, domiciled in the Commonwealth of Massachusetts, have an intellectual disability or a closely related condition such as PDD NOS and have severe functional impairments. She testified that she believed that the Appellant's functional limitation was primarily in the area of language. Dr. Shook noted that the Appellant had been found eligible for DDS autism services. Dr. Shook reviewed the documents that she took into consideration when making her decision of ineligibility. She said that in reviewing the [REDACTED] report of November 2007, she looked at the results of the Wechsler and the Vineland. She stated that the report indicated that the Appellant's had an articulation problem but that her IQ scores were in the average range. She also noted that the team offered a diagnoses of a Communication Disorder, Hypotonia and Developmental Coordination Disorder. Dr. Shook reviewed the letter from [REDACTED] MD of [REDACTED] May of 2008. She pointed out that in that letter; mention was made of testing done concluding that the Appellant's presentation was not consistent with an autism spectrum disorder. She noted that the report stated that the Appellant's elevated anxiety and compulsive behaviors met diagnostic criteria for Obsessive Compulsive Disorder and Anxiety Disorder and that she continued to meet diagnostic criteria for a Communication Disorder. Dr. Shook reviewed a letter

from [REDACTED] MD, MPH of [REDACTED] from August 2008 and stated that according to Dr. [REDACTED] the Appellant continued to be diagnosed with a Communication Disorder and continued to demonstrate fine motor needs necessitating the need for continued occupational therapy. Dr. Shook reviewed two reports written by [REDACTED] MD. Both reports that the Appellant has Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS), but Dr. Shook pointed out that although the ADOS was administered at [REDACTED], Dr. [REDACTED] did not see the report. She also pointed out that Dr. [REDACTED] did not conduct any testing to assist her in reaching this diagnosis. Dr. Shook testified that Dr. [REDACTED] letter of June 2009 states that she has been treating the Appellant for PDD NOS as well as Obsessive Compulsive Disorder, Mixed Receptive-Expressive Language Disorder and Enuresis and makes mention of the Appellant's increase in [REDACTED] and more obsessive behaviors as well as her difficulty in communication. Dr. Shook reviewed the Tuft's report and noted that the team did not diagnose the Appellant with PDD NOS. She also pointed out that they commented on her learning which did not seem to be severely impaired. Dr. Shook reviewed the two Vineland-II Reports and noted that the Appellant's mother's survey found the Appellant's adaptive behaviors to be low while the Appellant's teacher found her adaptive behaviors to be adequate. Dr. Shook stated that in her opinion the Appellant's teacher's survey was more in line with the other information that she reviewed. (1, 7-15)

## FINDINGS AND CONCLUSIONS

After carefully reviewing all of the evidence, I find that the Appellant has failed to show by a preponderance of the evidence that she meets the DDS eligibility criteria for Family Support services. My specific reasons are as follows:

In order to be eligible for DDS family supports, an individual who is younger than 18 years of age must meet the criteria set forth at 115 CMR 6.06 (1): (a) she must be domiciled in the Commonwealth, (b) she must have a verified diagnosis of intellectual disability<sup>3</sup> or a closely related developmental condition as defined in 115 CMR 2.01 or with respect to persons from age birth to five a developmental delay, (c) she must demonstrate severe functional impairments as defined in 115 CMR 2.01. There is no dispute that the Appellant meets the first criteria, and I specifically find that she meets that criterion; however I do not find that she has a verified diagnosis of intellectual disability or a closely related developmental condition.

By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate,

<sup>3</sup> 115 CMR 201 states that intellectual disability is the preferred term used to describe the condition of mental retardation and for the purposes of 115 CMR 2.00, is synonymous with the term mental retardation.



the Department has promulgated regulations which define mental retardation. The Department's regulations define mental retardation as significantly sub-average intellectual functioning existing concurrently and related to significant limitations in adaptive functioning. Mental retardation manifests before age 18. Significantly sub-average intellectual functioning is defined as an intelligence score that is indicated by a score of 70 or below as determined from the findings of an assessment using valid and comprehensive, individual measures of intelligence that are administered in standardized formats and interpreted by qualified practitioners. Closely Related Developmental Conditions means genetic, neurodevelopmental or physical disorders that have a significant overlap with intellectual disability, and result in similar support needs. For purposes of 115 CMR 6.001 (1), closely related developmental conditions may include: Williams Syndrome, Prader-Willi Syndrome, Lesch-Nyhan Syndrome, Angelman Syndrome, Cris du Chat Syndrome, Down Syndrome, Fragile X Syndrome, Cerebral Palsy. Pervasive Developmental Disorders including the following specified autism spectrum disorders: Autistic Disorder, Rett's Syndrome, Childhood Disintegrative Disorder, and Pervasive Developmental Disorder Not Otherwise Specified (NOS), Spina Bifida (Myelomeningocele type MMC), Tuberos Sclerosis, Fetal Alcohol Syndrome or any other developmental disorder that the Department determines to be a closely related condition. Severe functional impairments as defined in 115 CMR 2.01 mean functional impairments in at least three specified areas of adaptive functioning, based upon normative expectations of the types of skills normally acquired as the child develops, as measured by standardized assessment or comparable data. The areas of adaptive functioning considered are: self-care, communication (receptive or expressive language), learning, mobility and self-direction and for individuals age 14 or older, capacity for independent living and economic self-sufficiency.

I find that the Appellant does not have a verified diagnosis of intellectual disability as that term is used for the determination of DDS family supports. The WPPSI-III that was administered when she was five years [REDACTED] of age showed that her overall cognitive abilities were nicely developing and within the average range for her age. Early reading and math skills were also found to be average for her age. Dr. [REDACTED] stated that she suspected that the Appellant's overall level of intelligence was within the normal range, but perhaps on the lower side. When the Appellant was 7 years of age, she received a Full Scale IQ score of 89 far beyond the score of 70 required for a finding of intellectual disability.

I also find that the Appellant does not have a closely related condition as defined in the regulations.

Although there was documentary evidence presented which offered a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS), the weight of the evidence presented at the hearing does not lead to the conclusion that the Appellant has this condition or any other closely related developmental condition. There was one individual who offered this diagnosis in her reports; however there was expert testimony presented at the hearing which raised concerns about this diagnosis because no test results were offered to support it.

Although there was testimony that the Appellant had been found eligible for DDS Autism services, there was no evidence presented as to the criteria used in making such determination. However, there was evidence presented relative to an assessment done of the Appellant using the Autism Diagnostic Observation Schedule (ADOS) which found that her presentation was not consistent with an autism spectrum disorder.

The weight of the evidence showed that the Appellant has difficulties in language and motor skills, an anxiety disorder as well as an obsessive/compulsive disorder. None of these difficulties are evidence of an intellectual disability or of a closely related developmental condition as defined in the DDS regulations. Therefore, I find that these difficulties do not meet the criteria required for a finding of eligibility for DDS Family supports. Because I find that the Appellant does not have an intellectual disability or a closely related developmental condition, it is not necessary for me to address the issue of severe functional impairments. Functional impairments can be caused from a variety of conditions and are not necessarily related to an intellectual disability or a closely related developmental condition.

#### **APPEAL**

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L. c. 30A [115 CMR 6.34(5)].

Date: \_\_\_\_\_

\_\_\_\_\_  
Marcia A. Hudgins  
Hearing Officer